No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN,
EXECUTOR OF THE ESTATE OF STUART BROWN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL CREDITORS BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The NATIONAL CREDITORS BAR ASSOCIATION™ ("NCBA") is a nationwide, not-for-profit bar association of attorneys who represent creditors in all areas of creditors rights law.[1] Its members include over 500 law firms, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by the NCBA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of applicable laws and regulations.[2]

Members of the NCBA are regularly involved in the lawful collection of past-due consumer debts, including those debts that belong to debtors involved in bankruptcy. For this reason, NCBA members must interpret and comply with the often-unsettled requirements of applicable federal law, including Title 11 of the U.S. Code (the "Bankruptcy Code"). Members of the NCBA have a strong interest in ensuring that the Bankruptcy Code is interpreted and applied in a way that allows collection attorneys to execute their ethical

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioner filed a blanket consent to the filing of amicus briefs at the merits stage, in support of either party or neither party on February 6, 2019. Respondents provided written consent to the NCBA to file this amicus brief on March 22, 2019.

[2] The NCBA was formerly known as the National Association of Retail Collection Attorneys ("NARCA").

duty to advance their clients' legitimate interests—within the bounds of existing law—without constantly exposing themselves to substantial personal liability. The NCBA has participated as amicus curiae in other cases involving the ability of its member law firms and their attorneys to serve their clients. *See, e.g., Heintz v. Jenkins*, 514 U.S. 291 (1995); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010); *Marx v. General Revenue Corp.*, 568 U.S. 2 (2013); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

The NCBA is the only national bar association dedicated solely to the needs of collection attorneys. A reversal the Ninth Circuit's ruling would erroneously and unfairly expose attorney and law firm members of the NCBA, and many creditor clients of those members, to unjustified sanctions under bankruptcy law. The NCBA thus has a direct interest in this litigation, and it has authorized the filing of this brief.

SUMMARY OF ARGUMENT

The NCBA urges this Court to affirm the Ninth Circuit's opinion finding that contempt sanctions were inappropriate. In doing so, the NCBA asks this Court to adopt the reasoning of the Bankruptcy Appellate Panel that found contempt sanctions were inappropriate because Respondents had a reasonable, objective, good faith basis for lacking knowledge of the applicability of the discharge in light of the ambiguity created by the state court judgment. By doing so, the Court will create a bright line to guide

creditor rights attorneys, like NCBA members, when advocacy on behalf of their clients is warranted. The requirement of a good faith belief in the application of the bankruptcy discharge will ensure that creditor rights attorneys do not face the Hobbesian choice of legitimately and reasonably advocating for their clients or refusing to advocate for their clients for fear of personal contempt sanctions, malpractice liability, or disciplinary actions if their informed judgment ends up being incorrect. It is important to note that all debts are not discharged, such as domestic support obligations and some, but not all, student loans. The Bankruptcy Appellate Panel's reasoned analysis creates a balanced approach that does not reward an attorney (or his client) for blindly ignoring the scope of a bankruptcy discharge but recognizes the tension between an attorney's obligations to her or his client and the justice system when relying upon judicial interpretations by state (and federal) courts.

I. SUBJECTING ATTORNEYS TO CONTEMPT SANCTIONS FOR ADVANCING REASONABLE AND ZEALOUS LEGAL THEORIES CHILLS LEGAL ADVOCACY.

Attorneys are ethically bound to advocate on behalf of their clients, including advocacy in good faith to extend, modify or reverse existing law. ABA Model R. of Prof. Cond. 3.1.[3] Law is not a science that can be

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[3] Rather than cite to each state's disciplinary rules, Amicus cites to the ABA Model Rules of Professional Conduct, which are adopted in nearly every jurisdiction. *See* Alphabetical List of Jurisdictions Adopting Model Rules, (August 18, 2018) https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/. In those jurisdictions that have not adopted the

weighed and measured with certainty. It ebbs and flows as cases with different facts present opportunities to establish the contours and scope of the law. Attorneys are the key to fleshing out these legal issues as novel fact patterns and shifting law present viable opportunities for change and clarification. The ability to make good faith arguments for the extension, modification and reversal of law is at the heart of our judicial system. *See generally* Monroe H. Freedman & Abbe Smith, Understanding Lawyers' Ethics (4th ed. 2010) 16 ("the lawyer is the client's 'champion against a hostile world'").

Reversing the Ninth Circuit's decision will negatively impact an attorney's ability to make good faith arguments for the extension, modification and reversal of law. Sanctions put attorneys at risk of discipline, revocation (or denial) of licensure, and tarnished reputations, all of which directly affect an attorney's livelihood. By imposing contempt sanctions on a strict liability basis, without consideration of the attorney's legitimate evaluation of her client's claims, attorneys are incentivized to compromise their duty of loyalty and zealous advocacy to their clients for fear of personal reprisal.

Nor is this a theoretical assumption that perhaps a disciplinary tribunal, or potential client, will learn of a contempt sanction. For instance, some attorneys are under an ethical obligation to report sanctions to

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ABA's Model Rules of Professional Conduct, the different professional rules of conduct generally contain the same ethical obligations as the ABA's Model Rules; *see, e.g.*, Cal. R. Prof. Cond. 3-200 (attorney shall not present claims that are not warranted under existing law unless it can be supported by a good faith argument for an extension, modification or reversal of law).

the disciplinary arms of their licensing entities. *See* Cal. Bus. & Prof. Code § 6068(o)(3) (attorneys required to report judicial sanctions of $1,000 or more, except for discovery sanctions). This very Court, like many others, requires disclosure of sanction orders in its application for admission. *See* U.S. Supreme Court Rule 5(2) (attorney "must not have been the subject of any adverse disciplinary action . . . during [] 3-year period" prior to admission); U.S. Supreme Court Application for Admission to Practice, Question 12 ("Have you ever been disciplined, disbarred, sanctioned or suspended from the practice before any court . . . ?"). And, in the internet age, a simple Google search is all it takes for a potential client to learn of a sanctions order.

Clients rely extensively on their attorneys' judgment, advice, and professional competence. Moreover, as legal rules and obligations become more complex, clients are forced to rely increasingly on their attorneys, thus elevating the importance of attorney advice. Courts have repeatedly recognized that even the risk of sanctions could have a chilling effect on that advice and on advocacy. *See, e.g., United States v. Aleo*, 681 F.3d 290, 308 (6th Cir. 2012) (comparing the Rule 11 civil sanction standards with the higher standards in criminal cases); *In re Levine*, 27 F.3d 594, 596 (D.C. Cir. 1994) (recognizing that a Court's ruling on an evidentiary issue provides a necessary step in balancing the chilling effect sanctions have on a lawyer's efforts to advocate zealously and the appropriateness of sanctions for the orderly and efficient administration of justice). Appellant's position ignores the chilling impact strict liability in bankruptcy contempt proceedings about the applicability of

a discharge order will have in the face of good faith advocacy in reliance on judicial decisions.

II. STRICT CONTEMPT SANCTIONS UNJUSTIFIABLY INCREASE RISK OF MALPRACTICE.

A client routinely suffers the consequences of its attorney's errors. After all, "each party is deemed bound by the acts of his lawyer agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962) (internal citations omitted). Thus, mistakes of counsel are chargeable to the client even where the client merely relies, in good faith, on attorney advice.

This is true even in the context of contempt sanctions for violations of the discharge injunction. For example, in *In re Ritchey*, 512 B.R. 847, 851 (Bankr. S.D. Tex. 2014), the Court found not only the attorney, but the attorney's client, liable for a violation of the discharge injunction even though the client merely relied upon the advice of its counsel in pursuing a post discharge state court lawsuit. In such situations, courts have found the quality of legal advice received to be wholly irrelevant. *Peyrano v. Sotelo* (*In re Peyrano*), 2017 Bankr. LEXIS 1756, at *20 (B.A.P. 10th Cir. June 26, 2017) (not reported). Thus, even reliance on sound attorney advice, can subject an innocent client to liability. But, as the *In re Ritchey* Court noted, the client is not left to bear the burden alone. The client's recourse is against the attorney in a suit for malpractice. *Link*, 370 U.S. at 634, n.10.

Of course, certainty as to whether liability will lie in malpractice after an award of sanctions against

a client is a tougher question. Essentially, a legal malpractice claim is a "suit within a suit"; the plaintiff must demonstrate that he/she would have fared better in the underlying claim but for the attorney's negligence. *McMurtry v. Botts*, 2006 U.S. Dist. LEXIS 1655, at *1 (W.D. Ky. Jan. 17, 2006) (not reported). Take for example, a situation where an attorney has been hired to collect a debt owed to its client and allegedly obtained by the debtor by false pretenses. The debt is arguably non-dischargeable under 11 U.S.C. section 523(a)(2)(A) and/or (a)(6). In the midst of the collection action, the judgment debtor files for bankruptcy and is granted a general Chapter 7 discharge during the stay of state court proceedings. Failure to continue collection proceedings after the discharge may constitute malpractice if the attorney fails to continue. *See Partin v. Fischer*, 6 Mass. L. Rep. 523 (1997). But, litigation is inherently uncertain and the attorney risks strict liability contempt sanctions if the state court—or its appellate court for that matter—disagrees that the debt was obtained by fraud. While it is true that "[a]n attorney who acts in good faith and in an honest belief that his advance and acts are well founded and in the best interest of his client" may have a defense to malpractice, the prospect of strict liability sanctions or defending a malpractice action is not a pleasant choice. *Wabaunsee v. Harris*, 610 P.3d 782 (Okla. 1980).

While some may argue that there would be no harm due to malpractice insurance, it should be noted that a malpractice claim may or may not be insurable. A request for sanctions at heart is a demand for money. Accordingly, it may qualify as a "claim" against an attorney or her law practice. *Post v. St. Paul Travelers*

Ins. Co., 691 F.3d 500, 504 (3d Cir. 2012) (client's request for attorneys' fees as an item of relief in its answer to a sanctions petition constituted a civil proceeding that sought damages, and thus a suit, thereby triggering malpractice policy). Professional liability policies often exclude coverage for those claims seeking punitive or exemplary damages, sanctions, fines or penalties, with the idea that such awards serve to punish for deliberate wrongful conduct. *See, e.g., Jones, Foster, Johnston & Stubbs, P.A. v. Prosight-Syndicate 1110 at Lloyd's*, 2017 U.S. App. LEXIS 2550 (11th Cir. Feb. 14, 2017) (not for publication). While some courts have found exception depending upon the styling of the sanctions motion (*see Gauthier v. Twin City Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 105402 (W.D. Wash. Aug. 11, 2015) (not reported)), there is palpable risk that a well-meaning attorney can be held personally liable for a considerable sanction award notwithstanding the maintenance of insurance. And of course, any claim will likely cause the insurance rate to increase.

III. THE BANKRUPTCY APPELLATE PANEL'S BALANCED ANALYSIS WILL NOT LEAD TO THE PARADE OF HORRIBLES ARGUED BY APPELLANT.

Attorneys are ethically bound to advocate on behalf of their clients, but this obligation is not boundless. *See, e.g., United States CFTC v. Lake Shore Asset Mgmt.*, 540 F.Supp. 2d 994, 996 (N.D. Ill. 2008) ("Zealous advocacy is laudable, but at a certain point can turn into conduct that strikes at the heart of the court's core function of resolving disputes.") Attorneys may only assert arguments that have a good faith basis in law and fact, including arguments for the extension,

modification or reversal of existing law. *See* ABA Model R. of Prof. Cond. 3.1; *see also* Federal Rule of Civil Procedure 11(b)(2) ("By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person's knowledge . . . [that] the claims defenses, and other legal contentions are warranted by existing law or nonfrivolous argument for extending, modifying, or reversing existing law or for established new law.); Federal Rule of Bankruptcy Procedure 9011(b)(2) (Bankruptcy Court's Rule 11 counterpart).

In this case, the good faith basis is established by Mr. Brown's reliance on the state court's ruling. The Bankruptcy Appellate Panel's decision correctly draws a line between frivolous conduct and zealous advocacy based on the state court's judicial determination. Moreover, this is an analysis that courts are familiar with and address regularly, for instance in civil cases under Federal Rule of Civil Procedure 11, Bankruptcy Rule 9011, and their state law counterparts.

Further, from a fundamental perspective of fairness, attorneys should be able to rely on judicial determinations. Attorneys often receive, voluntarily or involuntarily, court guidance in the midst of an ongoing proceeding. Reserving sanctions for those scenarios where attorneys act with subjective bad faith ensures that only truly wrongful conduct is punished. *See In re Levine*, 27 F.3d at 596 (recognizing that a Court's ruling on an evidentiary issue provides a necessary step in balancing the chilling effect sanctions have on a lawyer's efforts to advocate zealously and the appropriateness of sanctions for the orderly and efficient administration of justice). Here, Mr. Brown

relied upon a judicial determination, and Appellant would have this Court ignore that reasonable reliance and permit contempt sanctions. Such a notion is truly contrary to fundamental notions of fairness, punishing an attorney for trying to do the right thing.

IV. THE AMBIGUITY OF THE "RETURN TO THE FRAY" DOCTRINE FURTHER SUPPORTS THE NINTH CIRCUIT'S HOLDING.

Not all legal concepts are set in stone. Relative to this case, there remains significant disagreement as to the concept of "returning to the fray" in bankruptcy courts. Some courts have refused to recognize the doctrine at all, insisting that it conflicts with the Bankruptcy Code and prior precedent. *See, e.g., In re Residential Capital v. PHH Mortgage*, 558 B.R. 77 (S.D.N.Y. 2016) ("There is . . . no basis for reading an exception for "voluntarily . . . returning to the fray" into the Bankruptcy Code."). Others fully embrace the doctrine without much analysis. *In re Bennett*, 2012 Bankr. LEXIS 3050, at *16 (Bankr. S.D. Tex. June 28, 2012) (assuming application of the doctrine without any independent analysis). The doctrine is a creature of case law, which continues to this day to develop based upon an underlying policy aimed at preventing debtors from using the bankruptcy "discharge shield . . . as a sword . . . to undertake risk-free litigation at others' expense." *In re Ybarra*, 424 F.3d 1018, 1026 (9th Cir. 2005).

As shown in the procedural history of this very case, distinguished justices from both state and federal courts have disagreed as to the proper application of the doctrine. As the United States' Brief indicates, that alone raises the question of whether contempt

proceedings are even appropriate. *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885). That point aside, the fact remains that an attorney would have little motivation to assert this doctrine in the future for fear of its ultimate rejection. While a debtor is certainly deserving of a "fresh start" under the Bankruptcy Code, that purpose is not served by allow the debtor a free attack on its former creditors. Put simply, there is no sound policy reason for converting contempt proceedings into a weapon to stifle entirely appropriate advocacy.

CONCLUSION

For all of the foregoing reasons, the NCBA respectfully submits that the decision of the Ninth Circuit should be affirmed. Mr. Brown's pursuit of attorneys' fees as an offset to the value of the business interest based on his reliance on the state court's decision was not contemptuous. A good faith argument in reliance on judicial determinations in the specific case and the unsettled nature of the law in general supports the conclusion that the conduct was not contemptuous. Moreover, the strict liability analysis argued by Appellant would expose the attorney to an unjustifiable risk of significant sanctions, discipline, revocation (or denial) of licensure, reputational harm, and injury to the attorney's livelihood. Further, it creates an unresolvable conflict with an attorney's duties of loyalty and zealous advocacy to its creditor client in light of these personal risks. Accordingly, the Supreme Court should affirm the Ninth Circuit's

decision, and find that the standard to determine contempt under these circumstances is an objective, reasonable standard.

Respectfully submitted,

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